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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MICHAEL WALKER, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and HOUSING AUTHORITY FOR THE CITY OF LOS ANGELES, Respondents.	B186992 (WCAB No. LAO 0763865)

PROCEEDING to review a decision of the Workers' Compensation Appeals Board. Annulled, reversed and remanded with directions.

Law Offices of Tom Takenouchi and Tom Takenouchi for Petitioner.

No appearance for Respondent Workers' Compensation Appeals Board.

Adelson, Testan & Brundo and Jeffrey D. Bilas for Respondent Housing Authority for the City of Los Angeles.

The Workers' Compensation Appeals Board (WCAB) awarded petitioner, Michael Walker, compensation for internal injury he sustained while working for respondent, Housing Authority for the City of Los Angeles (City). Walker petitioned to reopen the award claiming back injury and additional compensation, which the WCAB denied. Walker petitions for writ of review and contends that the WCAB's denial of his petition to reopen is not based on substantial evidence, and the petition should have been granted. The City disputes Walker's contentions.

We agree with Walker for the reasons stated in this opinion, and reverse.

BACKGROUND

Michael Walker, a plumber for the City, sustained an internal injury at work while lifting a toilet on February 15, 1999. Walker was treated for pain and swelling in the groin area by Jatin Bhatt, M.D., and returned to work with modified lifting. On May 7, 1999, Solomon Little, M.D., performed left inguinal hernia repair, and Walker was temporarily totally disabled until he was released to light office duty on or about July 28, 1999. On or about August 16, 1999, Walker was released by Drs. Bhatt and Little to his usual and customary duties, although he complained of an unexplained high level of constant groin pain. The City provided modified work.

On September 23, 1999, Walker was evaluated by Dr. Brautbar, who indicated in a report dated October 27, 1999, that he had previously examined Walker. The history included that leading up to the industrial injury Walker "complained to his supervisor about the strain on his back and shoulders and was finally given a truck with a lift gate, which alleviated part of his heavy lifting duties. His symptoms continued to exacerbate until 2/17/99 when he was sent to a doctor who diagnosed Hydrocele . . . ." Dr. Brautbar diagnosed industrial hernia with testicular swelling due to accumulation of fluid, and recommended a permanent work restriction of no heavy lifting and future medical consultation. Dr. Brautbar also reported that Walker had radiating pain, tingling and numbness from the surgical area to the lower extremity, and referred Walker to neurologist Isaac Regev, M.D.

On October 6, 1999, Walker was examined by Dr. Regev, who reported Walker's complaints of pain in the left testicle, inner groin and thigh. Dr. Regev recommended reevaluation by the surgeon for possible exploration of nerve entrapment. Dr. Regev also noted complaints of "minimal low back pain without any radicular symptoms."

Walker was periodically monitored and prescribed pain medications. Dr. Brautbar examined Walker on or about December 19, 2000, and reported complaints of pain at the hernia site and in the back, left leg and left foot.

On February 14, 2001, the parties proceeded to hearing before the workers' compensation administrative law judge (WCJ), and submitted on the record. The WCJ determined that Walker had sustained an internal injury and awarded him 27 percent permanent disability indemnity based on Dr. Brautbar's report of October 27, 1999. Walker did not petition the WCAB for reconsideration.

On November 1, 2002, Walker was examined by Dr. Regev. Walker complained of chronic pain in the left inner thigh to the testicles, which made it almost impossible to perform his job. Walker also had frequent low back pain radiating into his left leg, and Dr. Regev recommended a lumbar MRI. The MRI revealed a 2 millimeter disc bulge at L3-L4 that caused mild indentation on the anterior thecal sac and a 5 millimeter disc bulge at L5-S1 with severe degeneration. Walker was determined to be temporarily totally disabled by Drs. Regev and Brautbar and was provided therapy and medication.

On or about September 16, 2003, Walker filed a timely petition to reopen the WCJ's award. Walker contended that he had increased disability and need for medical care based on medical evidence concerning his back, which could not have been discovered earlier.

Walker also was examined by orthopedist Phillip Sobol, M.D. Dr. Sobol diagnosed lumbar sprain and strain with disc bulges and left lower extremity radiculitis. Dr. Sobol concluded that Walker's back injury was consistent with the lifting of a heavy toilet. Dr. Sobol confirmed that Walker was temporarily totally disabled, and recommended medications and various modalities of treatment. In a report dated October 17, 2003, Dr. Sobol recommended permanent work restrictions including no

heavy work, vocational rehabilitation, and continuation of medications and treatment except injections which Walker declined. Dr. Brautbar incorporated the findings of Dr. Sobol in a report dated August 9, 2004, except that vocational rehabilitation or returning to the open labor market was not practical considering "the totality of his disabilities including his chronic pain syndrome, and orthopedic disabilities."

The City obtained a medical-legal opinion from orthopedist David Pechman, M.D. Dr. Pechman examined Walker, reviewed medical records and concluded that Walker's lumbrosacral discogenic disease, work restriction of no heavy lifting and repeated bending and stooping, and need for medical care were nonindustrial. Dr. Pechman explained that Walker did not have back complaints until Dr. Regev reported minimal low back pain and Dr. Brautbar reported radicular back pain on December 19, 2000. In addition, the lumbar problems were not diagnosed, treated or restricted until 2002.

On July 6, 2005, the parties proceeded to trial. Walker testified that he reported back pain to the physicians since the injury, but received no treatment other than pain medication until he was no longer able to work. He was able to work until 2002 because the City provided accommodations such as the lift gate on his scooter, a dolly and assistance with lifting from other employees.

The WCJ concluded that Walker's back injury was nonindustrial and denied the petition to reopen. In the opinion on decision, the WCJ quoted from Dr. Pechman's report that back complaints had not been documented until Dr. Regev's report of October 6, 1999, and Dr. Brautbar's report of December 19, 2000. In regard to Dr. Brautbar's report of October 27, 1999, the WCJ stated that "[t]here is no mention of any low back injury or pain in this report."

Walker petitioned the WCAB for reconsideration. Walker contended that the evidence did not justify the WCJ's denial of his back injury and additional disability. Walker argued that the source of his pain was not discovered earlier because his symptoms were believed to be the consequence of his hernia and surgery; however, his back injury and pain are consistent with the mechanism of the industrial injury and the medical evidence.

In the report on reconsideration, the WCJ added that if Walker had injured his back in the industrial injury, it would have been substantiated by contemporaneous medical records. The WCAB adopted the WCJ's decision and report and denied Walker reconsideration.

CONTENTIONS

Walker petitions for writ of review and contends that the WCAB's denial of the petition to reopen is not supported by substantial evidence as required by *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317 (*Garza*), and *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 637 (*LeVesque*). The decision relies on the reasoning of Dr. Pechman, who concluded Walker's back injury is not industrial because there were no specific back complaints until Dr. Regev's report of October 6, 1999. But Walker relies on his testimony that he complained of back symptoms since the injury, and concludes that his pain was reasonably attributed to the hernia and surgery. And the mechanism of the injury also is consistent; the source of his back symptoms only became evident after the MRI, and any doubt should be resolved in finding injury under Labor Code section 3202.[1]

The City answers that the WCAB's decision is supported by substantial evidence, which should be sustained under *Garza*, *LeVesque* and *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164 (*Braewood Convalescent*). The City maintains that Dr. Pechman's opinion is substantial evidence because the onset of Walker's disabling back pain was not even mentioned by Dr. Brautbar for almost two years after the industrial injury. And causation may not be established by liberal

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[1] All further statutory references are to the Labor Code.

Section 3202 states: "This division and Division 5 (commencing with Section 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."

construction under section 3202, because each party has an equal burden of proof under the amended version of section 3202.5.[2]

Walker replies that the WCJ did not find he lacked credibility, the internal injury was admitted, and he met his burden of proof that the back injury is industrial.

DISCUSSION

I. Standard of Review

A factual finding, order, decision or award by the WCAB that is supported by substantial evidence is affirmed by the reviewing court. (Section 5952; *Garza*, *supra*, 3 Cal.3d at p. 317; *LeVesque*, *supra*, 1 Cal.3d at p. 637.) Substantial evidence in workers' compensation generally means evidence that is credible, reasonable, and of solid value, which a reasonable mind might accept as probative on the issues and adequate to support a conclusion. (*Braewood Convalescent*, *supra*, 34 Cal.3d at p. 164.) A factual finding, order, decision or award is not based on substantial evidence if unreasonable, illogical, arbitrary, improbable, or inequitable considering the entire record and overall statutory scheme. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233 (*Western Growers*); *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 254–255 (*Bracken*).) A medical expert's opinion which is based on incorrect or inadequate facts, conjecture, an erroneous examination or legal theory, or is no longer germane or beyond the physician's expertise, is not substantial evidence. (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 (*Place*); *Garza*, *supra*, 3 Cal.3d at p. 317; *Zemke v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 794, 798; *Robinson v. Workers' Comp. Appeals Bd.* (1981) 114 Cal.App.3d 593, 604–605; *Franklin v. Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 235.)

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[2] Section 3202.5 was amended by Senate Bill No. 899 on April 19, 2004, and states: "All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law. 'Preponderance of the evidence' means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

The reviewing court may not isolate facts which support or disapprove of the WCAB's conclusions and ignore facts which rebut or explain the supporting evidence, but must examine the entire record. (*Braewood Convalescent*, *supra*, 34 Cal.3d at p. 164; *Garza*, *supra*, 3 Cal.3d at p. 317; *LeVesque*, *supra*, 1 Cal.3d at p. 637.) In addition, the reviewing court may not reweigh evidence or decide disputed facts. (*Western Growers*, *supra*, 16 Cal.App.4th at p. 233.)

II. WCAB's Denial of Petition to Reopen Is Not Based on Substantial Evidence

The WCJ and Dr. Pechman relied heavily on the reasoning that Walker's back injury was nonindustrial because back complaints were not documented until Walker informed Dr. Regev of minimal low back pain on October 6, 1999, and Dr. Brautbar of radicular back pain on December 19, 2000. A review of the record indicates that this reasoning is based on an incorrect history and is flawed. Dr. Brautbar indicated in his report dated October 27, 1999, that he examined Walker on September 23, 1999, who recounted that he had received a lift gate for his truck after informing his supervisor about the strain on his back and shoulders, and he continued to have exacerbations of these symptoms at the time of the industrial injury. And Walker testified at trial that his complaints to physicians after the industrial injury included back pain, and he was accommodated at work with the lift gate, a dolly and assistance with lifting from other employees. This evidence, if credible, refutes the basis of the reasoning by the WCJ and Dr. Pechman that there was no documentation of back complaints more contemporaneous with the industrial injury.

"When a party testifies to facts favorable to his own position and any contradictory evidence is within the ability of the opposing party to produce, the latter party's failure to bring forth such evidence will require acceptance of the uncontradicted testimony unless there is some other rational basis for disbelieving it." (*Braewood Convalescent*, *supra*, 34 Cal.3d at p. 167.) The WCJ awarded compensation based on Dr. Brautbar's report of October 27, 1999, and did not indicate that the history or Walker's testimony in this regard lacked credibility. Because the City did not produce rebuttal

evidence such as testimony by the supervisor, we conclude this evidence is credible. (*Ibid.*; *Garza*, *supra*, 3 Cal.3d at pp. 317–318; *LeVesque*, *supra*, 1 Cal.3d at p. 639.)

In addition, the failure to consider Dr. Brautbar's history is not an isolated reason to disapprove the WCAB's denial of the petition to reopen. The history is probative evidence on industrial causation considering the entire record. It corroborates Walker's testimony and contention that he informed physicians of back complaints, but at the time the focus was entirely on the hernia as the source of his symptoms. This is understandable because the internal injury was admitted, required surgery and produced high levels of pain in the groin area. Even after Walker informed Dr. Brautbar of radicular back pain on December 19, 2000, diagnostic testing, treatment and restrictions were not provided until Walker was no longer able to work in 2002. Nevertheless, Walker's back injury is traceable to the industrial injury considering the entire record. Walker informed Dr. Brautbar on September 23, 1999, of continuing back complaints that were accommodated by the City, and Dr. Sobol concluded that the back injury was consistent with the mechanism of lifting a heavy toilet.

Therefore, Dr. Pechman's conclusion that Walker's back injury is nonindustrial is based on an inaccurate history, and his opinion is more conjecture and not substantial evidence. (*Place*, *supra*, 3 Cal.3d at p. 378.) The WCJ followed Dr. Pechman's history and opinion in reaching the same conclusion. The complete history is critical because the omitted facts are probative in rebutting or explaining the evidence supporting the denial of Walker's petition to reopen. (*Braewood Convalescent*, *supra*, 34 Cal.3d at p. 164; *Garza*, *supra*, 3 Cal.3d at p. 317; *LeVesque*, *supra*, 1 Cal.3d at p. 637.) These facts were not addressed by the WCJ or WCAB in light of the entire record. (*Western Growers*, *supra*, 16 Cal.App.4th at p. 233; *Bracken*, *supra*, 214 Cal.App.3d at pp. 254–255.) Consequently, the WCAB's denial of Walker's back injury and petition to reopen is not based on substantial evidence and must be annulled. (*Garza*, *supra*, 3 Cal.3d at p. 317; *LeVesque*, *supra*, 1 Cal.3d at p. 637.)

III. Petition to Reopen Should Have Been Granted

A timely petition to reopen may be granted if there is "new and further disability" under section 5410[3] or "good cause" under section 5803.[4] (*Nicky Blair's Restaurant v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 941, 953–958 (*Nicky Blair's Restaurant*) [independent medical examiner's work restriction applicable prior to award is another opinion, cumulative, and not evidence of "new and further disability" or "good cause"].)

"New and further disability" permitting an injured worker to reopen under section 5410 means that the industrial injury has caused new and further temporary or permanent disability or a change in physical condition necessitating medical treatment. (*Nicky Blair's Restaurant*, *supra*, 109 Cal.App.3d at pp. 954–955.) But an issue already litigated

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[3] Section 5410 provides: "Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation, including vocational rehabilitation services, within five years after the date of the injury upon the ground that the original injury has caused new and further disability or that the provision of vocational rehabilitation services has become feasible because the employee's medical condition has improved or because of other factors not capable of determination at the time the employer's liability for vocational rehabilitation services otherwise terminated. The jurisdiction of the appeals board in these cases shall be a continuing jurisdiction within this period. This section does not extend the limitation provided in Section 5407."

[4] Section 5803 states: "The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division, and the decisions and orders of the rehabilitation unit established under Section 139.5. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor. [¶] This power includes the right to review, grant or regrant, diminish, increase, or terminate, within the limits prescribed by this division, any compensation awarded, upon the grounds that the disability of the person in whose favor the award was made has either recurred, increased, diminished, or terminated."

The period to invoke section 5803 is limited by section 5804, which states in part: "No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years and any counterpetition seeking other relief filed by the adverse party within 30 days of the original petition raising issues in addition to those raised by such original petition."

that was subject to reconsideration and has become final may not be relitigated as "new and further disability" under section 5410. (*Ibid.*)

For example, in *Aliano v. Workers' Comp. Appeals Bd.* (1979) 100 Cal.App.3d 341, 364–367 (*Aliano*), a worker hit his head at work but the WCJ denied permanent disability indemnity and medical care which physicians indicated resulted from viral encephalitis. A petition to reopen was filed based in part on medical reports for treatment of the head, neck and back, and lab reports which were negative that had not been provided to the previous physicians or the WCJ. Although causation of the worker's condition at the time of the original decision could not be relitigated as "new and further disability" under section 5410, the court concluded that there was "good cause" to reopen under section 5803 because the employer had not provided the lab tests to physicians which contributed to the misdiagnosis. (*Aliano*, *supra*, 100 Cal.App.3d at pp. 366–370.)

In this case the WCJ awarded compensation for internal injury. Because the record indicates the "new and further disability" arises solely from the back injury, a petition to reopen under section 5410 appears not to be the applicable procedure.

But whether there is "new and further disability" under section 5410, "good cause" to reopen may be established under section 5803, and "new and further disability" may be indicative of "good cause." (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 241, 244 [inability to participate in vocational rehabilitation indicating increase in permanent disability awarded "good cause" to reopen]; *Nicky Blair's Restaurant*, *supra*, 109 Cal.App.3d at pp. 954–957, citing *Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (1973) 9 Cal.3d 848, 854–858; *Aliano*, *supra*, 100 Cal.App.3d at pp. 365–367.) "Good cause" to reopen may be shown by excusable mistake of fact (*Colonial etc. Ins. Co. v. Ind. Acc. Com.* (1941) 47 Cal.App.2d 487, 489–490 [disability indemnity rate based on wages received rather than average weekly earnings "good cause" to reopen]) or law (*Bartlett Hayward Co. v. Indus. Acc. Com.* (1928) 203 Cal. 522, 532–533 [court decision indicating worker's loss of good eye equates to 100 percent permanent disability constitutes "good cause" to reopen]) or inadvertence, and depends largely upon the circumstances of each case (*Pullman Co. v. Industrial Acc. Com.* (1946)

28 Cal.2d 379, 387–388; *Nicky Blair's Restaurant, supra*, 109 Cal.App.3d at pp. 955–957). But "good cause" should be based on grounds not within the knowledge of the WCAB at the time of the original award, which renders the award inequitable.[5] (*Nicky Blair's Restaurant, supra*, 109 Cal.App.3d at pp. 955–956; *Aliano, supra*, 100 Cal.App.3d at p. 366.) In other words, reopening for "good cause" is not a means to relitigate issues that should have been raised in a petition for reconsideration, or to present evidence that is simply cumulative or contrary. (*Merritt-Chapman & Scott Corp. v. Indus.A.C.* (1936) 6 Cal.2d 314, 320–323; *Nicky Blair's Restaurant, supra*, 109 Cal.App.3d at pp. 955–957.)

We conclude that "good cause" to grant Walker's petition to reopen under section 5803 exists in this case. As we have explained, the record indicates that the WCJ did not consider Dr. Brautbar's history in light of the entire record, which rebutted or explained Dr. Pechman's history and opinion that Walker's back injury is nonindustrial. A misdiagnosis that omits a part of the body may constitute "good cause" to reopen if there was good reason for the facts to be developed after the decision and time for reconsideration. (*Nicky Blair's Restaurant, supra*, 109 Cal.App.3d at p. 957.)

A misdiagnosis constituting "good cause" was indicated in *Ryan v. Workmen's Comp. App. Bd.* (1968) 265 Cal.App.2d 654. There, the WCJ denied further benefits for a neck injury alleged to be greatly exaggerated by the injured worker. The court ruled that a petition to reopen under section 5410 or section 5803 should have been granted based on a subsequent myelogram and operation which disclosed that the neck complaints were legitimate. In addition, *Aliano* determined that a different part of the body may be the subject of "good cause" to reopen. The court stated that, "the finding in the original decision of injury to the head did not preclude finding of injury to the neck in

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[5] Section 5900, subdivision (a), states: "Any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a workers' compensation judge under any provision contained in this division, may petition the appeals board for reconsideration in respect to any matters determined or covered by the final order, decision, or award, and specified in the petition for reconsideration. The petition shall be made only within the time and in the manner specified in this chapter."

the decision granting reopening in light of there being 'good cause.'" (*Aliano*, *supra*, 100 Cal.App.3d at p. 371.)

Although Dr. Brautbar's history was contained in the record when compensation was awarded, the physicians and parties had reasonably focused on the accepted internal injury and surgery as the source of Walker's symptoms and pain. The nature and extent of the back injury which resulted in similar complaints was not revealed until Walker was unable to work and the MRI was performed. Considering the disability and need for medical care indicated by Drs. Sobel, Brautbar and Pechman, we conclude that the original award is inequitable and there was "good cause" to reopen under section 5803.

IV. Walker Met His Burden of Proof Regarding Causation

The City also contends that section 3202.5 as amended by Senate Bill No. 899 precludes Walker from meeting his burden of proof regarding causation by liberal construction under section 3202. Assuming the amended version of section 3202.5 applies to this case (see *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 284), we have concluded without liberal construction that Walker established industrial causation of his back injury by a preponderance of substantial evidence in light of the entire record.

DISPOSITION

The WCAB's denial of Walker's petition to reopen for industrial injury to the back is annulled and reversed. The matter is remanded to the WCAB to determine the nature and extent of disability and need for medical care, and for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

I concur:

ROTHSCHILD, J.

I concur in the judgment only.

VOGEL, J.